

Issue: Qualification – Discipline (counseling memo); Ruling Date: January 18, 2017;
Ruling No. 2017-4473; Agency: Virginia Department of Emergency Management;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Department of Emergency Management
Ruling Number 2017-4473
January 18, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution¹ (“EDR”) at the Department of Human Resource Management on whether his October 27, 2016 grievance with the Virginia Department of Emergency Management (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 30, 2016, the grievant was issued a Notice of Improvement Needed/Substandard Performance. The grievant initiated a grievance on October 27, 2016, challenging the Notice of Improvement Needed/Substandard Performance. After proceeding through the management resolution steps without resolution, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management’s decision, or whether state policy may have been misapplied or unfairly applied.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as “EDR” in this ruling to alleviate any confusion. EDR’s role with regard to the grievance procedure remains the same post-merger.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

In this case, the grievant challenges the Notice of Improvement Needed/Substandard Performance by asserting that the agency failed to address most of the problems noted prior to his receipt of the Notice.⁸ The management action challenged here, a Notice of Improvement Needed/Substandard Performance, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁹ Therefore, the grievant’s claims relating to his receipt of the Notice of Improvement Needed/Substandard Performance do not qualify for a hearing.¹⁰

While the Notice of Improvement Needed/Substandard Performance has not had an adverse impact on the grievant’s employment,¹¹ it could be used later to support an adverse employment action against the grievant. Should the Notice of Improvement Needed/Substandard Performance grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a “Below Contributor” annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

EDR’s qualification rulings are final and nonappealable.¹²



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⁶ Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁷ Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ In his response to the second step, the grievant notes that the second step-respondent “is correct in that [the grievant does] not have an issue with the Notice of Improvement/Substandard Performance document form itself” or “with how the process works.” Rather, the grievant explains, the primary issue is that the agency failed to bring its concerns to him prior to issuing the Notice.

⁹ See Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

¹⁰ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that he wishes to challenge, correct, or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹¹ None of the alleged effects of this action challenged by the grievant rise to the level of an adverse employment action.

¹² See Va. Code § 2.2-1202.1(5).